Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

NO. 79-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANNY VINCENT,

Appellant

V.

STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court of Criminal Appeals

MOTION TO DISMISS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

FACTS 2

ARGUMENT AND AUTHORITIES 2

INDEX OF AUTHORITIES

Cases **Page**

Ballage v. State, 459 S.W.2d 823 (Tex.Crim.App. 1970) 3

Beck v. Washington, 369 U.S. 541 (1962) 4

Bonahan v. Nebraska, 125 U.S. 692 (1887) 5

Cardinale v. Louisiana, 394 U.S. 437 (1969) 4

Copeland v. State, 240 S.W.2d 779 (Tex.Crim.App. 1951) 4

Estelle v. Dorrough, 420 U.S. 534 (1975) 3

Fonesca v. State, 455 S.W.2d 244 (Tex. Crim. App. 1970) 3

Ex parte Gurley, 286 S.W. 222 (1926) 3

Herndon v. Georgia, 295 U.S. 441 (1935) 4

Hill v. California, 401 U.S. 797 (1970) 4

Holliday v. State, 482 S.W.2d 215 (Tex. Crim. App. 1972) 3

Lafferty v. State, 60 S.W.2d 222 (1933) 3

Ex parte Leopard, 520 S.W.2d 759 (Tex. Crim. App. 2975) 3

Michigan v. Tyler, 436 U.S. 499 (1978) 4

Molinaro v. New Jersey, 396 U.S. 365 (1970) 5

Moore v. Illinois, 408 U.S. 786 (1972) 4

Moreno v. State, 544 U.S. 398 (Tex. Crim. App. 4976) 4

Ex parte Reid, 581 S.W.2d 686 (Tex. Crim. App. 1979) 3

Rodriguez v. State, 457 S.W.2d 555 (Tex. Crim. App. 1970) 3

Smith v. United States, 94 U.S. 97 (1876) 5

Tacon v. Arizona, 410 U.S. 351 (1973) 4

Ex parte Trillo, 540 S.W.2d 555 (Tex. Crim. App. 1976) 4

Statutes

art. 42.12, Tex. Code Crim. Proc. 2

art. 44.09, Tex. Code Crim. Proc. 3,4

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DANNY VINCENT,

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V.

STATE OF TEXAS,

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MOTION TO DISMISS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of Texas, Appellee herein, moves this Court to dismiss the case of *Danny Vincent v. State of Texas*, Cause No. 79-5962. Appellant Vincent violated Tex. Code Crim. Proc. art. 44.09, and, as a result, the Texas Court of Criminal Appeals lost jurisdiction of the case before it was decided. Consequently, Appellee would show that this Court does not have jurisdiction of Appellant Vincent's case. In support thereof, Appellee would submit the following:

FACTS

I.

Appellant Vincent challenges the constitutionality of Tex. Code Crim. Proc. Ann. art. 42.12 probation revocation procedures by way of a direct appeal from a decision of the Texas Court of Criminal Appeals. Following the submission of Appellant's jurisdictional statement and the Appellee's motion to dismiss or affirm, this Court directed that the case should be granted review. The briefs of both Appellant and Appellee have been submitted to the Court and oral argument has been scheduled for the fall session on November 5, 1980.

II.

On August 11, 1980, appellee was first informed that the appellant, Danny Vincent, escaped from custody during the pendency of his appeal to the Texas Court of Criminal Appeals. See Appellee's Exhibit "A". Appellant was sentenced on July 11, 1978, to serve six years in the Texas Department of Corrections. As stated in the Brief for Appellee, p. 7, the appellant was granted an appeal bond which was increased from $2,000.00 to $12,000.00 on August 2, 1978.

Appellant Vincent thereafter violated his bond agreement and left the State of Texas. He was arrested in the State of Colorado for a felony offense of forgery and placed on probation on February 20, 1979. On July 25, 1979, the Colorado probation was revoked and Appellant immediately began serving his five year sentence at the Colorado State Reformitory at Buena Vista. See Appellee's Exhibit "B".

ARGUMENT AND AUTHORITIES

I.

Under Texas law, the Texas Court of Criminal

Appeals lost jurisdiction of the appellant's case at the time of Vincent's escape from custody. Because that decision was void, this Court should not now review it.

The relevant portion of the applicable statute, Tex. Code Crim. Proc. art. 44.09, reads:

> If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the Court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; . . .

This Court has specifically affirmed the constitutionality of Tex. Code Crim. Proc. art. 44.09 in *Estelle v. Dorrough*, 420 U.S. 534 (1975). In that case, the Court noted, "since the statute provides that jurisdiction shall 'no longer attach' upon escape, the escape itself divests the court jurisdiction with later dismissal being a mere formality." *Estelle v. Dorrough, supra* at 535 n. 1; citing *Lafferty v. State*, 60 S.W.2d 222 (1933); *ex parte Gurley*, 286 S.W. 222 (1926). When notified that an appellant has escaped, the Texas Court of Criminal Appeals has consistently dismissed cases which fall within the purview of this statute. *Ex parte Reid*, 581 S.W.2d 686 (Tex.Crim.App. 1979); *ex parte Leopard*, 520 S.W.2d 759 (Tex. Crim. App. 1975); *Holliday v. State*, 482 S.W.2d 215 (Tex. Crim. App. 1972); *Ballage v. State*, 459 S.W.2d 823 (Tex. Crim. App. 1970); *Rodriguez v. State*, 457 S.W.2d 555 (Tex. Crim. App. 1970); *Fonesca v. State*, 455 S.W.2d 244 (Tex. Crim. App. 1970).

II.

Under Texas law, Appellant Vincent was "in custody"

pursuant to his appeal bond. *See Ex parte Trillo*, 540 S.W.2d 555 (Tex. Crim. App. 1976); *see also, Moreno v. State*, 544 S.W.2d 398 (Tex. Crim. App. 1976); *Copeland v. State*, 240 S.W.2d 779 (Tex. Crim. App. 1951). Vincent escaped from custody and thereby subjected himself to the dismissal required by Tex. Code Crim. Proc. art. 44.09. The Texas Court of Criminal Appeals, however, was not notified of this fact; thus, the Texas court did not dismiss Vincent's case.

III.

Unless a federal question is raised and decided in the state court below, this Court has no jurisdiction over the case. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *see Tacon v. Arizona*, 410 U.S. 351 (1973); *Moore v. Illinois*, 408 U.S. 786 (1972); *Hill v. California*, 401 U.S. 797 (1970). The Court has recognized that each state has a right to prescribe rules to be applied when a litigant attempts to invoke the jurisdiction of its appellate courts. *Beck v. Washington*, 369 U.S. 541 (1962); *see Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978). A litigant's failure to follow the established appellate channels precludes his right to Supreme Court review of the state actions. *Herndon v. Georgia*, 295 U.S. 441 (1935).

IV.

Texas law requires that a criminal appellant remain in custody during the pendency of his appeal. Tex. Code Crim. Proc. art. 44.09. Appellant Vincent violated this requirement, thereby automatically divesting the Texas Court of Criminal Appeals of jurisdiction over his case. Appellee State of Texas submits that this Court should not now take an appeal from a state court decision which is void for lack of jurisdiction.

V.

The policies of this Court which call for the dismissal

of a case when a litigant escapes pending his Supreme Court appeal underscore the rationale of the Texas law.

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call on the resources of the Court for determination of his claims.

Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). The facts outlined in this motion place the case in the same posture as *Molinaro v. New Jersey*. Appellee State of Texas respectfully requests that this Court decline to adjudicate Appellant Danny Vincent's case and immediately strike the case from the Court's docket. *Smith v. United States*, 94 U.S. 97 (1876); *Bonahan v. Nebraska*, 125 U.S. 692 (1887).

WHEREFORE, PREMISES CONSIDERED, Appellee State of Texas respectfully requests that this Court dismiss Appellant Danny Vincent's appeal for lack of jurisdiction or, in the alternative, that the Court decline to adjudicate the appellant's case because of his escape.

Respectfully submitted,

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APPELLEE'S EXHIBIT "A"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF OCHILTREE
STATE OF TEXAS
Criminal Action no. 1494

In RE: the case of:	*	
	*	
THE STATE OF TEXAS	*	
Plaintiff	*	MOTION FOR
vs.	*	CONCURRENT
	*	SENTENCE
DANNY VINCENT	*	
	*	
Defendant	*	

COMES NOW, the Defendant, Danny Vincent, pro se, and requests this Honorable Court to hear and consider this Motion, and gives as grounds therein the following:

1. That the Defendant was sentenced on the 23rd day of May, 1977, to a term of six (6) years in the State Penitentiary at Huntsville, for the crime of Burglary of a Habitation.

2. That the Defendant was released upon Appeal Bond on the 10th day of July, 1978, after his probation in the aforementioned case was revoked for Drinking Under the Influence of Alcohol.

3. That the Defendant absconded his Appeal Bond, and did flee to the State of Colorado.

4. That the Defendant was arrested in said State of Colorado on or about the 5th day of December, 1978, and has since been found guilty of the crime of Forgery in the second degree, and has been incarcerated in the Colorado Department of Corrections since on or about the 28th day of July, 1979.

5. That the Defendant is currently incarcerated in

the Buena Vista Correctional Facility, in Buena Vista Colorado, and the fact that he is still wanted in the State of Texas, and the fact he must return to the State of Texas upon release from said Colorado Department of Corrections brings him grief and mental anguish.

6. That the Defendant wishes to resolve his term in said State of Texas, and to reach a disposition with a conclusion of both his said terms to be served concurrently in the State of Colorado Department of Corrections.

7. That the Defendant is currently involved in Vocational and Therapy Counseling groups so that he might acquire a useful trade that might serve him upon release from the Department of Corrections, and to gain an insight into the problems that have led to his past criminal activities and current incarceration, respectively.

8. That the Defendant is currently enrolled in the Buena Vista Correctional Facility Vocational Electronics class, and is currently receiveing [sic] excellent work ratings and progress reports.

9. That the Defendant has an alcohol problem, and is attending Alcoholics Anonymous to learn to understand, cope, and overcome his alcohol problem.

10. That the Defendant is scheduled for sessions with Dr. Karl Waggoner, Psychiatrist at the Buena Vista Correctional Facility, so that he might learn to identify, understand, copy and rectify the attitudes and behavior that led to his incarceration, and past criminal activity.

11. That the Defendant is currently showing a genuine desire to reform, and to learn to be, and upon release be, a useful, productive citizen of Society.

12. That the Defendant believes the extended time currently awaiting him in the State of Texas will be

caustic and detrimental to his current positive behavior in that extended time will only further expose him to a criminal element that would be impossible to ignore under the circumstances of extended incarceration.

13. That the Defendant believes that his behaviour [sic] and revision of attitudes since hin [sic] incarceration in the Colorado Department of Corrections merits a critical, impartial, and positive consideration by this Honorable Court upon reciept [sic] of this Motion.

That the Defendant believes, and has faith in, the State of Texas fairness and Justification in Ordering his incarceration, and believes that the said State of Texas will favorably consider this Motion,

15. Further, Defendant sayeth not.

WHEREFORE, it is respectfully requested that this Honorable Court find cause and give Order pertaining to the Defendants term in the State of Texas to be served concurrently with the term now being served by the Defendant in the Colorado Department of Corrections so that Justice will be duly served, and the cause of Rehabilitation fully done.

Wherefore this Motion is Respectfully Submitted to this Honorable Court in the hope and faith that it will receive impartial and positive consideration.

/s/
Danny Vincent
Box 'R'
Buena Vista Co.
81211

STATE OF COLORADO

COUNTY OF CHAFFEE

Subscribed and Sworn to before me this _____ day of November, 1979.

My Commission expires _____

_____

Notary Public

APPELLEE'S EXHIBIT "B"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
STATE OF COLORADO
Case No. 79CR0009 Division 7

PEOPLE OF THE STATE OF COLORADO	*	JUDGMENT OF CONVICTION, SENTENCE AND MITTIMUS
vs.	*	
DANNY DUANE VINCENT, Defendant	*	

PEOPLE OF THE STATE OF COLORADO to the Sheriff of Jefferson County, and Superintendent of the Colorado State Diagnostic Unit at Canon City, Colorado.

ON this day, Danny Duane Vincent, the Defendant herein, being personally present in Court, and being represented by Laurin Garner, Attorney at Law, and the Defendant having been arraigned in this Court upon an ~~*Indictment,~~ *Information, previously filed herein, to which the Defendant entered a plea of *Guilty, ~~*Not Guilty, *Nolo Contendere,~~ and after having been found Guilty by ~~*a verdict of the jury,~~ *by the Court, of the offense(s) of:**

Second Degree Forgery, 1973 CRS 18-5-103, as amended (Class IV Felony),

**INDICATE STATUTORY SECTION, SUB-SECTION, AND CLASS AFTER EACH COUNT

and the Court having afforded the Defendant an opportunity to make a statement on his/her behalf, and to present any information in mitigation of punishment, and the People having been given an opportunity to be heard on any matter material to the imposition of sentence:

NOW, THEREFORE, the Court being fully advised in the premises, it is the Judgment and Sentence of the

Court that the Defendant be sentenced to imprisonment at the *Colorado State Reformatory at Buena Vista, Colorado, *_____ ~~County Jail at~~ _____ Colorado, for *a term of not less than two years, nor more than five years, ~~*for an indeterminate term not to exceed~~ _____**

(Defendant was placed on probation on February 20, 1979. On July 25, 1979, Defendant admitted he violated the terms and conditions of probation and probation was revoked.)

**TYPE WHEN APPROPRIATE WHETHER EACH COUNT IS TO RUN CONCURRENTLY OR CONSECUTIVELY

~~and *a fine of~~ _____ ~~and *costs in the amount of~~ $_____

THIS SENTENCE is imposed after giving full consideration for _____ presentence confinement which the Defendant has undergone with respect to the transaction for which he/she is being sentenced, and the Sentence imposed reflects that credit *was,* was not given for such confinement.

IT IS FURTHER ORDERED: That Defendant be given credit for 79 days' pre-sentence confinement against both the minimum and maximum sentence.

(PRE-SENTENCE REPORTS ATTACHED)

THEREFORE, IT IS ORDERED that the Sheriff of Jefferson County, shall convey the Defendant to the *Colorado State Diagnostic Unit at Canon City, Colorado, ~~*the~~ _____ ~~County Jail at~~ _____ ~~Colorado,~~ and safely deliver him/her to the Superintendent of said institution to be received and kept as provided by law.

Done in open court this 25th day of July, 1979 at Golden, Colorado

By the Court:

/s/

District Judge (Joseph P. Lewis

Entered into the register of actions of the Court this 25th day of July, 1979.

JANET M. SCHERF
Clerk of the Court

/s/

By _____
Deputy Clerk

*Strike as to form

Sheriff's Return

I hereby certify that on the _____ day of _____, 19_____, I duly executed the within Order by delivering to _____ Superintendent of the _____ at _____ , Colorado, the person of _____ , the within named defendant pursuant to said Order.

FEES: Service $ _____
Mileage $_____
Return $ _____
Total $ _____

_____
Sheriff

By: _____
Deputy

Receipt by State Institution

I hereby certify that on the _____ day of _____, 19 _____, the Sheriff of _____ County, delivered into my custody ofr imprisonment at the Colorado State _____ at _____ , Colorado, the person of _____, the Defendant ordered and sentenced and confined herein.

/s/ Lou Hesse, Director
Diagnostic Center

By: /s/
Dallas H. Dunn, Records
Supervisor

Endorsement of Confinement Pending Appeal

I hereby certify that _____, the Defendant herein ordered confined at the _____ County Jail, was received on the _____ day of _____, 19_____, and was released on the _____ day of _____, 19 _____ to the custody of _____.

_____ _____
Sheriff

By: _____
Deputy

Receipt by County Jail

I hereby certify that _____, the Defendant herein ordered vonfined to the _____ County Jail, was received on the _____ day of _____, 19 _____.

_____
Sheriff

By: _____
Deputy